

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

G4S REGULATED SECURITY
SOLUTIONS, A DIVISION OF
G4S SECURE SOLUTIONS (USA) INC.
f/k/a THE WACKENHUT CORPORATION
and

Cases 12-CA-26644
12-CA-26811

THOMAS FRAZIER, an Individual
and
CECIL MACK, an Individual

**ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION**

I. Statement of the Case

These cases¹ involve alleged violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation (Respondent). Specifically, the Complaint alleges that Respondent suspended and discharged long term employees Thomas Frazier and Cecil Mack in retaliation for their protected concerted complaints regarding the wages, hours, and working conditions of Respondent's employees.

¹ The hearing in these cases was held before Administrative Law Judge William N. Cates (the ALJ) on April 4, 5, and 6, 2011 in Miami, Florida. The ALJ issued a Decision on June 27, 2011, finding Frazier and Mack to be statutory supervisors. Pursuant to the Acting General Counsel's exceptions, the Board determined, contrary to the ALJ, that Respondent failed to meet its burden of establishing that its lieutenants, including Frazier and Mack, were statutory supervisors, and remanded this matter to the ALJ, for a supplemental decision regarding "solely the Section 8(a)(1) discharge allegations." *G4S Regulated Security Solutions*, 358 NLRB No. 160, slip op. at p. 4 (September 28, 2012). On November 16, 2012, the ALJ issued a Supplemental Decision (ALJSD), finding the discharges to be unlawful. Respondent has filed exceptions and a supporting brief with the Board on December 21, 2012. The Acting General Counsel is separately filing an Answering Brief to Respondent's Exceptions.

II. Issues Presented

1. Whether the ALJ erred by failing to make findings and conclusions based on the evidence which establishes that Respondent indefinitely suspended Thomas Frazier and Cecil Mack because they engaged in protected concerted activity and to discourage employees from engaging in these or other concerted activities, in violation of Section 8(a)(1) of the Act, and by failing to recommend appropriate remedies regarding the suspensions. (Cross-Exceptions 1, 2 and 3).

2. Whether the ALJ erred by failing to include provisions in the remedy for Respondent's unfair labor practices, pursuant to *Latino Express, Inc.*, 359 NLRB No. 44 (2012), requiring Respondent to reimburse Frazier and Mack for any excess federal and state income taxes owed upon receiving a lump-sum backpay award covering more than one year of backpay, and to notify the Social Security Administration as to the appropriate periods in which to allocate backpay. (Exception 3 and 4).

III. Argument

A. The ALJ erred by failing to find that Respondent unlawfully suspended Thomas Frazier and Cecil Mack because of their protected concerted activities and to discourage other employees from engaging in these or other concerted activities, and by failing to provide appropriate remedies regarding the suspensions. (Cross-Exceptions 1, 2 and 3)

1. The Board should consider and decide the suspension issues.

Although the Board ordered the ALJ to consider "solely" the alleged unlawful discharges, it appears that the Board inadvertently omitted the alleged unlawful suspensions from its remand order. Thus, in his initial Decision the ALJ only determined the issue as to whether or not Frazier and Mack were employees or statutory supervisors, and did not reach the merits of the suspension or discharge

allegations. 358 NLRB No. 160, slip op. at p.7-14. Thus, the suspension issues were not decided by the ALJ or the Board, and it appears that the Board considered the indefinite suspensions of Frazier and Mack, which occurred days before their ultimate discharges, to be part and parcel of the discharge allegations. The Board's use of the word "solely" appears to have been intended to mean that the ALJ should not again address the supervisory issue on remand. Thus, the Acting General Counsel believes that the Board did not intend that the ALJ fail to address the suspension issues.

Notwithstanding the ALJ's literal interpretation of the Board's remand order, the suspension issues were fully litigated and the parties had a full opportunity to brief them pursuant to the allegations set forth in paragraphs 6(a), 6(c) and 7 of the complaint in these cases. [GCX 1(g)].

In its initial brief to the ALJ and its brief to the Board in response to the Acting General Counsel's exceptions to the initial ALJ Decision, Respondent did not distinguish between the suspensions and discharges, showing that it considered them as a single event. Respondent's brief to the ALJ dated May 13, 2011, at p.29-35; Respondent's brief to the Board dated September 7, 2011, in response to GC exceptions 17 and 18 to the ALJD, at p.38-43. In addition, Respondent addressed the common suspension and discharge issues in its brief in support of exceptions to the ALJ's Supplemental Decision, and will have the opportunity to further brief the issue of the suspensions in an answering brief to the instant cross-exceptions.

In his Supplemental Decision, the ALJ made complete findings of fact, including credibility resolutions on all issues relevant to the suspensions. (ALJSD 2:20-23, 3:20-21, 3:36 to 5:32). In these circumstances, there will be no prejudice to Respondent if

the Board decides the suspension issues on the merits, and Counsel for the Acting General Counsel submits that the Board considered the suspension issues to be subsumed by the discharge issues. *Mammoth Coal Co.*, 358 NLRB No. 159, slip op. at p. 10, fn. 34 and accompanying text (2012); *Sands Hotel and Casino*, 306 NLRB 172 (1992), enfd. 993 F.2d 913 (D.C. Cir. 1993); see also Section 102.48(b) of the Board's Rules and Regulations.

2. Respondent suspended Frazier and Mack because they engaged in protected concerted activities.

The ALJ's findings of fact and the record evidence establish that Respondent provided the same rationales for the indefinite suspensions of long-term employees Thomas Frazier and Cecil Mack from their positions as lieutenants on Respondent's security force at the Florida Power and Light nuclear power plant at Turkey Point, Florida, as it did for their discharges. As set forth by the ALJ, Respondent suspended Mack on February 2, 2010 and suspended Frazier on February 12, 2010, before discharging them on February 22, 2010, and February 15, 2010, respectively. (ALJSD 2:20-28; Tr. 185, 189-194 – Frazier, 277-287 - Mack). He further found that Frazier and Mack raised various concerns about working conditions with management on behalf of the security officers. (ALJSD 2:40-47). In his analysis the ALJ stated:

The Company was aware that the complaints reported by Frazier and Mack including having lanyards on weapons, the wearing of vests, uncomfortable chairs, insufficient water, and being posted in the sun for 6 hours without any shelter were complaints raised by security officers relating to their working conditions.

(ALJSD 6:19-22).

In February 2010, Respondent began a leadership effectiveness review of supervisors at Turkey Point. (Tr. 41:11-14 Mareth). This process entailed the review of

a 360-degree Leadership Feedback Tool submitted by security officers, and a management development questionnaire. (Tr. 42:1-7 Mareth.) Security officers completed and submitted the 360-degree Leadership Feedback Tool (360 Tool) in February 2010, and managers completed the Performance Assessment Network Management Development Questionnaires (Questionnaires) in 2009. (Tr. 41:22-25; 42:8-10 Mareth; GCX 5-Questionnaire for Frazier; GCX 6-360 Tools for Frazier). The 360 Tool was used as part of the promotion process and to provide feedback to Respondent from the security officers. (Tr. 148:1-3, 12 Macdonald).

Based on the information gathered from the Questionnaire and the 360 Tool, Respondent determined that Thomas Frazier failed his leadership effectiveness review. (Tr. 45:10-14; 20-21 Mareth; GCX 7). Although Frazier received a positive annual evaluation and positive One on One quarterly reviews in 2009 from Shift Captain Quentin Ferrer, his immediate supervisor, these performance reviews were not taken into consideration. (Tr. 50:10-15 Mareth; GCX 8 and GCX 10). Karen Macdonald, the leadership development manager, compiled the information for the Leadership Effectiveness Review for Frazier dated February 8, based on his Questionnaire dated 5/15/2009, and the 360 Tool dated 2/4/2010. The comments which support the low score for supervisor effectiveness that Frazier received are as follows:

... He demonstrates unwillingness to accept, adapt, and contribute to change. **Tom lacks an innovative attitude and openly criticizes management decisions at team briefings. Instead of assisiting his team members to accept change, Tom often fuels the flames with his own opinion.** Often, Tom identifies problems, places blame, and does little to actively solve an issue with sound analysis and solutions. He often applies this ineffective pattern which compounds problems rather than developing new and succssful outcomes. He doesn't see himself as part of management, and therefore is not leading us into the future.

(GCX 7 at page 1, misspellings in original, emphasis added).

On February 12, Frazier discovered that his badge had been placed on hold and his access to the plant was suspended. (Tr. 185:4-5, 13-15 Frazier). Mareth instructed Frazier not to work as scheduled on Saturday or Sunday, and to meet with him on Monday, February 15, at 10 a.m.

On Sunday, January 31, 2010, Mack initially received a call from Captain Ferrer for work the following Monday, but then on February 1, 2010, Mack received another call directing him not to report for work because he was suspended for the "... bullshit incident that happened in the hallway" on January 25, 2010. (Tr. 284:8-16 Mack). This incident and the subsequent relevant facts were correctly recounted by the ALJ. (ALJSD 3:36 to 5:24).

On Wednesday (February 3, 2010), Mack called Mareth, who told Mack that he was suspended for using foul language in front of Florida Power & Light security pending an investigation. (Tr. 284:20-285:2 Mack). Later in February, Mareth called Mack and requested a meeting on February 22, 2010, at 12 noon. Mack requested that Rittmer of Florida Power and Light be present as well. (Tr. 285:12-25 Mack).

Mack began the February 22nd meeting by asking Rittmer why he waited a couple of days later to bring up the issue of his alleged use of foul language or acting in an unprofessional manner. Rittmer stated he had his vacation on his mind at the time, and then he left the meeting. (Tr. 286:9-15; 287:3 Mack). Mack asked Rodriguez why he did not speak up when he knew that Mack did not curse. Rodriguez told Mack that he did seem calm but he could not confirm if he did or did not curse because he (Rodriguez) was inside the Final Access Control office at the time. (Tr. 286:17-22

Mack). Mareth told Mack that the investigation was concluded and he was terminating Mack's employment. Mareth said he had a witness who claimed that Mack used foul language. (Tr. 287:5-7 Mack). When Mack countered by stating there were also witnesses who said that he did not use foul language, Mareth admitted that there were conflicting stories, but said he was terminating Mack's employment. (Tr. 287:9-11 Mack). At that point, Mareth presented Mack with an Employee Disciplinary/Corrective Action Notice which states the following reason for discharge:

Cecil was involved in an incident with the client that involved undesired behavior. As part of the process management completed a review of Cecil's personnel file. As a result of the review it is managements perspective that Cecil's performance does not meet expectations for Supervision. You are being issued a Level 1 violation. Failure to meet satisfactory job performance or behavior standards.

(GCX 22).

There is no dispute that Mack was discharged as a result of the review of his personnel file and Respondent's conclusion that his performance did not meet its expectations for supervision, as found in Mack's Leadership Effectiveness Review dated February 9, 2010. (Tr. 102:7-10 Macdonald). The Leadership Effectiveness Review was based on his Performance Assessment Network Management Development Questionnaire dated July 10, 2009, and the Competency-Based 360 Feedback Tool dated February 4, 2010. (Tr. 47:4-11 Mareth). The comments on the Leadership Effectiveness Review which support the low score received by Mack are as follows:

He demonstrates unwillingness to accept, adapt, and contribute to change. **Cecil lacks an innovative attitude and openly criticizes management decisions at team briefings. Instead of assisting his team members to accept change, Cecil often fuels the flames with**

his own opinion.... Often, Cecil identifies problems, places blame, and does little to actively solve an issue with sound analysis and solutions. He often applies this ineffective pattern which compounds problems rather than developing new and successful outcomes. He doesn't see himself as part of management, and as viewed by one direct report, **'is on the security officer's side.'** Cecil finds it difficult to demonstrate a balanced view.

(GCX 13 at page 1, misspellings in original, emphasis added).

Mack's Leadership Effectiveness Review explained the gap between his high leadership score on his Competency-Based 360 Tool and his low score on his Management Development Questionnaire as follows:

This gap is caused by the above-mentioned over alignment with security officer concerns and too little attention to the remainder of his duties [sic] (customer focus and lack of support for management decisions). ... There are no scores in the above-average range. This indicates a leader who is more "a team member" than a team leader.

(GCX 13 at page 1, emphasis added).

Mack was never told about the leadership effectiveness program or the results from it, and he was unaware that he was being reviewed. (Tr. 106:23-25 Macdonald; 289:4-13 Mack; GCX 13). He had never seen or discussed the management development questionnaire. (Tr. 291:10-12 Mack).

The ALJ correctly found that Mack was suspended on February 2, 2010, and Frazier was suspended on February 12, 2010. (ALJSD 2:22-23).

Respondent does not contest that on February 12, 2010, Frazier's badge had been placed on hold and his access to the plant was suspended. (Tr. 185:4-5, 13-15 Frazier). In fact, Mareth told Frazier not to work on Saturday or Sunday and to meet him on February 15, 2010, at which time he was informed of his discharged.

As noted above, with respect to Mack, on January 31, 2010, he received a call from Captain Ferrer, telling him to report for work the following day. On February 1, 2010, Mack got another call from Captain Ferrer, saying that Mack was not to report to the shift or the training, and that he was being suspended for the “bullshit incident that happened in the hallway” and that Mareth would call him the next day. (Tr. 284:8-016 Mack). When Mareth failed to call, Mack called Mareth who told him that he was suspended for foul language in front of Florida Power & Light security pending investigation. (Tr. 284:20-285:2 Mack; ALJSD 4:9-16).

The suspensions of Frazier and Mack were adverse actions which directly affected their employment. Frazier’s suspension was for the exact same reasons as his discharge which closely followed, and which the ALJ found unlawful. The timing of the suspension in relation to the discharge also supports the conclusion that the decision to suspend Frazier was based on the same reason as the decision to discharge him. The ALJ correctly concluded that Respondent “has not established that Frazier and Mack would have been discharged in the absence of their protected concerted activity.” (ALJSD 7:30-32). He further correctly concluded that they were discharged in response to their “engaging in protected concerted activities by presenting complaints on behalf of the security guards and advocating their positions regarding those complaints so much so that they were deemed not be ‘a part of management’ and were on ‘on the security officer’s side.’” (ALJSD 8:10-13). It is axiomatic that the suspension was also based on this premise. (ALJSD 7:24-26, 35; 8:3-6).

Additionally, the ALJ credited Mack’s testimony and correctly concluded that he did not use the offensive language that served as a basis for his suspension, and that

because Respondent's assertion that Mack used offensive language was false, it failed to establish the Respondent discharged Mack for legitimate reasons. (ALJSD 7:26-28, 7:40 to 8:7). Similarly, Respondent has failed to show that it would have suspended Mack in the absence of his protected concerted activity. The ALJ also properly concluded that under Respondent's disciplinary policy, even if Mack had used offensive language the first offense for such an infraction would have been an oral counseling rather than a suspension. (ALJSD 5:21-29).

Respondent acted at its peril by instituting indefinite suspensions to Frazier and Mack which resulted in their unlawful discharges. Given the timing of the decision to suspend Frazier which was closely followed by his discharge, it is apparent that the reason for the suspension was in response to his engaging in protected concerted activities by presenting complaints on behalf of the security guards and advocating their positions regarding those complaints. With regard to Mack, the ALJ credited his testimony and properly concluded that the reason for his suspension was not justified and false. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). It appears that Mack was suspended shortly before Respondent completed its evaluation of his performance as a purported supervisor. However, these events were very close in time and the Board should infer that Respondent considered Mack's protected concerted activities in deciding to suspend him, as it did when it discharged him, particularly in view of the ALJ's conclusion, citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), that the offensive language incident was a pretextual reason for Mack's discharge.

Respondent's actions were calculated to chill the exercise of Section 7 rights by Frazier and Mack who, in light of the Board's finding, have been found to be protected

by the Act. *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012); *Shelby Memorial Home*, 305 NLRB 919, 919 fn.2 (1991), *enfd.* 1 F.3d 550 (7th Cir. 1993). As a result, Respondent violated Section 8(a)(1) of the Act by suspending Frazier and Mack because of their protected concerted activity.

Accordingly, it is respectfully submitted that the Board include appropriate remedies and provisions in its Order and Notice to Employees with respect to the suspensions. The backpay periods of Frazier and Mack should commence on February 12, 2010, and February 2, 2010, respectively, the dates of their suspensions, and the suspensions, like the discharges, should be expunged from Respondent's records.


B. Respondent should be required to reimburse Thomas Frazier and Cecil Mack for any excess federal income taxes owed upon receiving a lump sum backpay award covering more than one year of backpay and to notify the Social Security Administration as to the appropriate periods in which to allocate backpay. (Exceptions 4 and 5)

On December 18, 2012, the Board ruled that it will routinely require respondents to compensate employees for any extra taxes they have to pay as a result of receiving the backpay in a lump sum covering more than one calendar year, and that it will also require respondents to routinely file a report with the Social Security Administration allocating the back wages to the years in which they were or would have been earned. *Latino Express*, 359 NLRB No. 44. The Board decided to apply these remedies retroactively to all pending cases. 359 NLRB No. 44, slip op. at p.2. Accordingly, these remedies should be applied in the instant case with respect to the suspensions and discharges of Frazier and Mack.

III. Conclusion

Based on the above, Counsel for the Acting General Counsel respectfully urges the Board to grant the Acting General Counsel's cross-exceptions in their entirety.

DATED at Miami, Florida this 11th day of January, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Acting General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Supplemental Decision in the matter of G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA), Inc., f/k/a The Wackenhut Corporation, Cases 12-CA-26644 and 12-CA-26811 were served electronically upon the following individuals on this 11th day of January, 2013.

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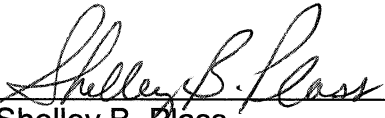
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